

SNOHOMISH COUNTY HEARING EXAMINER

BSRE POINT WELLS, LP,

Appellant

v.

SNOHOMISH COUNTY PLANNING AND
DEVELOPMENT SERVICES,

Respondent.

NO. 11-101457 LU

CLOSING BRIEF OF BSRE POINT
WELLS, LP

The Hearing Examiner requested the parties submit closing briefs, which include analysis of: (1) the Hearing Examiner's discretion to grant an extension; (2) whether there is a substantial conflict under SCC 30.61.220 if a variance is pending; (3) whether the Urban Center Code (the "Code") contemplates applications being supplemented; and (4) if an extension is granted, how it should be structured. Accordingly, BSRE Point Wells, LP ("BSRE") respectfully submits this brief to address those issues and provide an analysis of why (a) there is reasonable doubt as to each alleged substantial issue of conflict and (b) an extension should be granted.

I. There is Reasonable Doubt as to Each Alleged Substantial Conflict Such that BSRE's Application Should Not Be Prematurely Denied.

The issues on which PDS relies for its argument BSRE's application should be denied without preparation of a draft environmental impact statement ("DEIS") pursuant to SCC 30.61.220 have either already been or can quickly be resolved. None of the issues identified amount to a "substantial conflict" sufficient to justify PDS's premature denial of the Point Wells

1 project (the “Project”) prior to SEPA review being completed and the site plan being finalized. As
2 Ryan Countryman testified on May 21, 2018, PDS has rarely invoked SCC 30.61.220. This makes
3 sense given the typical review process, which includes multiple iterations of project applications.
4 PDS has failed to show that the issues identified constitute a “substantial conflict.” Per the Oxford
5 Living Dictionary, “substantial” is defined as “of considerable importance.”¹ PDS has failed to
6 show the issues identified are “of considerable importance,” that they have not been and cannot be
7 promptly resolved, and that they provide any indication that the project is not feasible. Reasonable
8 doubt exists as to whether each of the recommended grounds for denial are sufficient; this matter
9 should be remanded to PDS for compliance with Chapter 30.61 SCC.

10 A. BSRE Documented Feasibility and Code Compliance of the Second Access Road.

11 As Jack Molver testified on May 23, 2018, PDS did not inform BSRE it needed to provide
12 a secondary access road until December of 2015. Prior to this date, PDS and BSRE had a number
13 of discussions about whether having a secondary access road was feasible but it was not until
14 December 2015 when PDS finally asserted a secondary access road would be required. At that
15 time, PDS did not specify whether that road would be required to be a full access road or an
16 emergency access road. Once PDS finally informed BSRE that a full access secondary access
17 road would be required, BSRE redesigned the project to include such an access road.

18 The majority of the road is along property owned by BSRE within the Town of Woodway
19 and, as such, is not subject to review by Snohomish County. Despite this, the road has been
20 designed to be in compliance with SCC 30.53A.512, and BSRE has expressly agreed to have the
21 project be conditioned on having a full access secondary access road. *See* G-14.

22 The Hearing Examiner Rules of Procedure specifically allow for an application to have
23 “preconditions” to approval. See Rules of Procedure 8.1, 8.2. Hearing Examiner Rule of
24 Procedure 8.3 provides the Hearing Examiner may determine the deadline for fulfillment of the
25 preconditions based on “a realistic estimate of the amount of time necessary for a prudent and
26

27 ¹ See <https://en.oxforddictionaries.com/definition/substantial>.

1 reasonable person to complete the required action(s).” In this instance, where actual approval of
2 the secondary access road is not under the purview of Snohomish County, approval conditioned
3 on the secondary access road is appropriate. Further, BSRE provided additional information to
4 assuage the County’s concerns with the May 15, 2018 Memo from Mark Davies (Exhibit G-23),
5 and the May 15, 2018 Landslide Deviation Clarification Letter (Exhibit A-37). Such information,
6 in conjunction with BSRE’s willingness to have the project approval be conditioned on the full
7 access secondary access road, is sufficient to show reasonable doubt exists as to whether there is
8 a substantial conflict on this issue.

9 **B. BSRE Has Provided Appropriate Building Heights.**

10 PDS asserts two distinct issues with respect to building heights.

11 *i. High Capacity Transit*

12 First, PDS argues BSRE’s proposal is in substantial conflict with SCC 30.34A.040(1). This
13 ordinance provides:

14 The maximum building height in the UC zone shall be 90 feet. A building height
15 increase up to an additional 90 feet may be approved under SCC 30.34A.180 when
16 the additional height is documented to be necessary or desirable when the project
17 is located near a high capacity transit route or station and the applicant prepares an
environmental impact statement pursuant to chapter 30.61 SCC that includes an
analysis of the environmental impacts of the additional height on, at a minimum:

- 18 (a) aesthetics;
- 19 (b) light and glare;
- (c) noise;
- 20 (d) air quality; and
- (e) transportation.

21 SCC 30.34A.040(1). The DEIS has been drafted to include analysis of the environmental impacts
22 of the additional height on the aspects set forth on SCC 30.34A.040(1). *See* Exhibit E-3. For this
23 alleged conflict, PDS only asserts BSRE has failed to provide sufficient proof the proposed project
24 will be located near a high capacity transit station. In making this assertion, PDS essentially
25 rewrites the language of SCC 30.34A.040(1).
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1 Where statutory language is “plain, free from ambiguity and devoid of uncertainty, there
2 is no room for construction because the legislative intention derives solely from the language of
3 the statute.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995). In undertaking a
4 plain language analysis, the Court must remain careful to avoid “unlikely, absurd or strained”
5 results. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (internal quotation and
6 citation omitted). “Statutes must be read so that each word is given effect and no portion of the
7 statute is rendered meaningless or superfluous.” *City of Spokane Valley v. Spokane County*, 145
8 Wn. App. 825, 831, 187 P.3d 340 (2008). “Only where the legislative intent is not clear from the
9 words of a statute may the court resort to extrinsic aids.” *Berrocal v. Fernandez*, 155 Wn.2d 588,
10 590, 121 P.3d 82 (2005) (internal quotation and citation omitted). While an agency’s interpretation
11 is given great deference where a statute is ambiguous, there is no need for the agency’s expertise
12 absent ambiguity. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm’n*, 123 Wn.2d
13 621, 628, 869 P.2d 1034 (1994). The Court retains the ultimate authority to interpret a statute. *Id.*
14 at 627. Further, an agency does not get deference for a determination which conflicts with a statute.
15 *Dept. of Labor & Indus. V. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991).

16 Here, PDS’s interpretation is directly in conflict with the plain language of SCC
17 30.34A.040(1). The plain language gives two alternatives for high capacity transit—the project
18 must be located “near a high capacity transit route *or* station.” SCC 30.24A.040(1) (emphasis
19 added). The only reading of this statute which does not render a portion of the statute “meaningless
20 or superfluous” is that which recognizes two distinct options—proximity to either (1) a high
21 capacity transit route, *or* (2) a high capacity transit station. The County even recognized this
22 reading in a hearing before the Growth Management Hearing Board (“GMHB”): “The County
23 contends the Urban Center locational criteria are met by location ‘on a regional high capacity
24 transit route,’ regardless of present or planned transit access at that location.” See Exhibit I-347,
25 p. 13. Despite its prior recognition of the plain meaning of this language, the County now argues
26 SCC 30.34A.040(1) must be interpreted as requiring proximity to a high capacity transit station
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1 specifically and proximity to a high capacity transit route is not sufficient. PDS bases this
2 interpretation in part on the GMHB's ruling in *City of Shoreline, et al. v. Snohomish County, et*
3 *al.*, Coordinated Case Nos. 09-3-0013c and 10-3-0011c. *See* Exhibit I-347. There, the GMHB
4 challenged the County's position regarding the "locational criteria" as being inconsistent with the
5 County's comprehensive plan. *Id.* at p.16. However, the GMHB ruling is not dispositive here.

6 RCW 36.70A.302 provides the GMHB may determine that all or a part of a comprehensive
7 plan or development regulations are invalid. However, RCW 36.70A.302(2) states:

8 A determination of invalidity is prospective in effect and does not extinguish rights
9 that vested under state or local law before receipt of the board's order by the city or
10 county. The determination of invalidity does not apply to a completed development
11 permit application for a project that vested under state or local law before receipt
of the board's order by the county or city

12 The statutory authority for the GMHB to determine the validity of a comprehensive plan
13 or development regulations is therefore limited by the express language of RCW 36.70A.302(2).
14 The Washington Supreme Court recognized this in *Town of Woodway v. Snohomish County*, 180
15 Wn.2d 165, 322 P.3d 1219 (2014).

16 In *Woodway*, opponents to the Project specifically argued BSRE should not be vested to
17 the Urban Center zoning designation because of the GMHB's ruling in *City of Shoreline*.
18 However, the Court, based on RCW 36.70A.302, held "whether or not a challenged plan or
19 regulation is found to be noncompliant or invalid, any rights that vested before the [GMHB's] final
20 order remain vested after the order is issued." *Id.* at 175. "The [GMHB] can find noncompliance
21 or invalidity, but neither finding retroactively affects vested rights." *Id.* at 178. Washington has
22 adopted a "date certain" rule for vesting, which "creates certainty and predictability for all parties
23 and protects property rights." *Id.* at 180. Just as the GMHB's ruling could not retroactively affect
24 the Project's vesting, it can also not retroactively affect the meaning of SCC 30.34A.040(1). Even
25 if SCC 30.24A.040(1) arguably was in conflict with the County's comprehensive plan at the time
26 it was adopted, that does not change the fact that BSRE is vested to that statute as it is written.
27 PDS cannot now rewrite or reinterpret that statute. Therefore, proximity to a transit route is

1 sufficient under SCC 30.34A.040(1). It is indisputable that BSRE satisfies the requirement of
2 being near a high capacity transit route as the rail line goes directly through the Point Wells site
3 (the "Site"). Allowance for an urban center on a high capacity transit route is logical because it is
4 likely a high capacity transit provider would create an additional stop near an urban center if there
5 is sufficient demand for a stop as the urban center becomes more densely populated. Because the
6 Site is located on a high capacity transit route, there is no substantial conflict with SCC
7 30.34A.040(1).

8 In the alternative, even if proximity to a transit route was not sufficient under the statute,
9 there is reasonable doubt as to whether a substantial conflict exists with respect to SCC
10 30.34A.040(1) because BSRE is willing and able to comply with the alternative option of being
11 close to a high capacity transit stop. BSRE has proposed several options for providing high
12 capacity transit. First, as demonstrated by Douglas Luetjen's May 24, 2018 testimony, BSRE has
13 been communicating with Sound Transit over the last eight years and is confident Sound Transit
14 will allow for a stop at Point Wells once the site has enough residents to justify a stop there. *See*
15 *also* Exhibit H-24. Sound Transit has considered adding a stop in the Richmond Beach/Shoreline
16 area, *see* Exhibit H-26, and BSRE has received no information to indicate Sound Transit would
17 not be willing to put a stop at the Site if the demand was high enough (estimated to be 1,000
18 residents) and BSRE was willing to fund the construction of the station. BSRE has already
19 committed to funding the stop and to working with BNSF railroad in order to facilitate the stop on
20 the rail lines. *See* Douglas Luetjen May 24, 2018 Testimony. BSRE has considered Sound
21 Transit's design guidelines in creating its design and has hired consultants with a proven track
22 record of working with Sound Transit and BNSF. *Id.* In addition, BSRE is submitting
23 simultaneously with this brief a shoreline conditional use permit application for approval of a
24 passenger ferry to provide water taxi service between Point Wells and Edmonds until the Sound
25 Transit stop is in operation.

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2 *ii. Residential Setbacks*

3 Second, PDS argues BSRE's proposal is in substantial conflict with SCC 30.34A.040(2).

4 This ordinance provides:

5 Buildings or portions of buildings that are located within 180 feet of adjacent R-
6 9600, R-8400, R-7200, T or LDMR zoning must be scaled down and limited in
7 building height to a height that represents half the distance the building or that
8 portion of the building is located from the adjacent R-9600, R-8400, R-7200, T or
9 LDMR zoning line (e.g. – a building or portion of a building that is 90 feet from R-
10 9600, R-8400, R-7200, T or LDMR zoning may not exceed 45 feet in height).

11 SCC 30.34A.040(2)(a). The buildings proposed to be built in the Upper Plaza are located
12 adjacent to property which was annexed by the Town of Woodway in 2016 and which is currently
13 zoned Urban Restricted ("UR"). Under the plain language of the statute, SCC 30.34A.040(2)(a)
14 only applies to buildings which are located adjacent to specific zoning designations: R-9600, R-
15 8400, R-7200, T, or LDMR. This code provision does not have any language which would apply
16 these restrictions to equivalent zoning designations, and UR zoning is not included in the specific
17 language of SCC 30.34A.040(2)(a). Therefore, this restriction is not applicable to the buildings
18 proposed to be built in the Upper Plaza area.

19 PDS's October 6, 2017 comment (the "10/6/17 Letter") letter included a comment that
20 SCC 30.34A.040(2)(a) applies because "UR zoning is roughly equivalent to the former R-9600
21 zoning that the site had prior to annexation." See Exhibit G-13, p.20. As stated by Carsten Stinn
22 during his May 23, 2018 testimony, the 10/6/2017 Letter was the first time BSRE learned PDS
23 believed SCC 30.34A.040(2)(a) should apply where buildings are to be located adjacent to UR
24 zoning. In an abundance of caution, because of the 10/6/17 Letter, BSRE submitted a variance
25 request on April 27, 2018, to allow for building heights in excess of that set forth in SCC
26 30.34A.040(2)(a) given the unique circumstances and topography of the Point Wells site.

27 Given the plain language of SCC 30.34A.040(2)(a), no variance is necessary for buildings
located adjacent to UR zoning. If a variance is required, there is reasonable doubt as to whether
BSRE's plans are in substantial conflict with SCC 30.34A.040(2)(a) because a variance is pending.

1 The variance is to be ruled on by the hearing examiner pursuant to SCC 30.43B.020(2). For the
2 reasons discussed in Section IV below, there is reasonable doubt as to whether a substantial conflict
3 exists where a variance is pending.

4 C. BSRE Has Provided Adequate Parking.

5 BSRE has agreed to apply PDS's definition of "Retirement Housing" set forth in SCC
6 30.62.032 [2013] for the undefined term of "senior housing" set forth in SCC 30.34A.050 [2010].
7 See Appendix A, attached hereto. As acknowledged by PDS at the hearing, this issue has been
8 resolved and there is no substantial conflict with code related to the proposed parking.

9 D. Shoreline Management Regulations.

10 The only sub-issues identified on PDS's issue matrix (Exhibit O-4a, Appendix A) (the
11 "Issue Matrix") relate to shoreline protection measures and commercial uses on the pier. Both
12 issues have been addressed by BSRE. There is reasonable doubt that a substantial conflict exists.

13 *i. The Residential Development Does Not Require Shoreline Protection*
14 *Measures*

15 As Bill Gerken testified on May 24, 2018, the residential developments proposed by BSRE
16 are not dependent on shoreline protection measures. BSRE has proposed an esplanade both as a
17 pedestrian accessibility feature and an emergency access option. The esplanade has a small
18 separation wall on the side closest to the buildings, but this wall is not a shoreline protection
19 measure. See Exhibit G-24, Exhibit P-17. Instead, the wall simply separates the esplanade from
20 the beach. *Id.* The location of the esplanade was determined to allow for a dynamically stable,
21 public access beach. Exhibit G-24. "The expanded beach area will be capable of dissipating wave
22 energy like a natural beach. No shoreline protection measures are proposed for the protection of
23 residential lots or project infrastructure." *Id.*

24 The esplanade and buildings have been intentionally set in a location and at an elevation
25 so that shoreline protection measures are *not* necessary. *Id.*; Bill Gerken May 24, 2018 Testimony.
26 In addition, the separation wall can be removed. *Id.* Because this issue, if PDS insists it is an
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1 issue, can be addressed with a simple design fix, it cannot be considered a “substantial conflict.”
2 For these reasons, there is reasonable doubt as to whether a substantial conflict exists under
3 Shoreline Management Master Program (“SMMP”), Residential Development, General
4 Regulation #5 with respect to shoreline protection measures. If the County still insists, despite
5 Mr. Gerken’s expert testimony and corresponding report to the contrary, that the esplanade and
6 supporting wall constitute a shoreline protection measure and that removal of the wall is not
7 sufficient to remove the confusion about whether this constitutes a shoreline protection measure,
8 BSRE will submit the applicable variance request.

9 *ii. BSRE Does Not Propose Any Commercial Uses on the Pier*

10 The second sub-issue raised by PDS is the prohibition on commercial uses within a
11 Conservancy Environment. BSRE has complied with this requirement by removing references to
12 having a café on the pier in the revised project narrative submitted on May 15, 2018 (*see* Exhibit
13 A-40). The other uses for the pier set forth in the project narrative are not commercial uses and
14 therefore would not be prohibited in the Conservancy Environment.

15 The remaining issue which arises with the pier is whether the operation of a water taxi or
16 local ferry service would constitute a “commercial use” and thus be prohibited on the pier. Randy
17 Middaugh, during his May 22, 2018 testimony, testified that, if the water taxi service was not a
18 commercial use, such as a free ferry service, then it would not be prohibited, but could instead
19 require a conditional use permit. Exhibit P-12. Mr. Middaugh testified there is no express
20 prohibition on a non-commercial ferry service being located on the pier. Assuming Mr.
21 Middaugh’s interpretation of the SMMP regulations with respect to a water taxi or ferry service is
22 correct, a water taxi/ferry service is permitted with a conditional use permit. The Department of
23 Ecology (“Ecology”) has the final decision-making authority for this type of conditional use
24 permit. *See* Exhibit P-12, p. F-5. BSRE has simultaneously submitted a conditional use permit to
25 the County for it to forward to the Ecology for review. *See* Appendix B, submitted herewith. Since
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1 all commercial uses have been removed from the pier, there is no substantial conflict with respect
2 to the SMMP regulations.

3 E. Compliance with Code Provisions Regarding Critical Areas.

4 In the Issue Matrix, PDS identifies five sub-issues under its heading of “Failure to Comply
5 with Code Provisions Regarding Critical Areas.” Reasonable doubt exists for each of these alleged
6 substantial conflicts with code.

7 *i. Development Activities in Landslide Hazard Area or Its Setback*

8 The County alleges BSRE’s proposal is in conflict with SCC 30.62B.340 and SCC
9 30.62B.320 because the plans call for buildings and a secondary access road to be located within
10 a landslide hazard area or its setback (collectively, a “Hazard Area”). However, SCC 30.62B.340
11 specifically provides deviations may be granted to allow development within such a Hazard Area.
12 BSRE has submitted deviation requests to allow for the construction of the secondary access road
13 and construction of buildings within the Hazard Area. As Ryan Countryman testified on May 24,
14 2018, PDS has not yet issued a determination on BSRE’s deviation requests. Should PDS deny
15 BSRE’s deviation requests, BSRE should be given the opportunity to either revise the deviation
16 request or change the site plan so the deviation is not necessary. As Randy Sleight testified on
17 May 22, 2018, when Mr. Sleight considers deviation requests, he often sits down with the engineer
18 who prepared the deviation request to make sure he has enough information to consider such
19 request. This is consistent with BSRE’s position that revisions are expected. Here, Mr. Sleight
20 has not yet met with BSRE’s geotechnical engineer. The issues raised by Mr. Sleight with respect
21 to the deviation requests are not significant and are easily resolved with a supplement to the
22 deviation request. BSRE is currently working to revise the deviation request to provide additional
23 information about (1) the stability and liquefaction of the second access road, (2) the permanent
24 drainage for the building basements in the Upper Plaza, and (3) the availability of alternate
25 locations for the buildings proposed to be located in the Upper Plaza. This information will be
26 provided no later than June 30, 2018.
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1 Unless and until the deviation requests are denied, there is reasonable doubt that the
2 proposal is in substantial conflict with SCC 30.62B.320 and .340. If a project with a pending
3 deviation request is deemed to be in substantial conflict with the Code, provisions allowing for
4 deviation requests would be directly in conflict with the statute allowing premature denial.

5 *ii. Adequacy of Geotechnical Report*

6 In its May 9 Supplemental Staff Recommendation (Exhibit N-2) (the “May 9 Report”)²,
7 PDS alleges Hart Crowser’s geotechnical report is in substantial conflict with SCC 30.62B.320
8 and .340. However, PDS’s comments on this issue show PDS’s misunderstanding of the options.
9 PDS alleges certain information must be provided now, as opposed to at the “building design
10 stage”. See Exhibit N-2, p. 22. However, these are not the only two options. Instead, this type of
11 project should have a DEIS prepared, a public comment period, and then revisions made to the site
12 plan to address the findings in the DEIS and the public comments. After the site plan has been
13 revised through that process, additional studies could be completed and additional information
14 could be provided based on the expected final design of the project. This is certainly prior to the
15 “building design” stage. Furthermore, the May 9 Letter specifically stated “[A]t this stage in the
16 permitting process, the applicant must demonstrate the *feasibility* of the structures.” (Emphasis in
17 original.) Thus even PDS recognizes that this is not the final design stage of the permitting process.

18 Hart Crowser’s April 20, 2018 report (Exhibit C-33) and revised Landslide Deviation
19 Letter (Exhibit A-37) provide substantial information by which PDS can determine that the project
20 is feasible. To provide additional clarification for the County, however, Hart Crowser will revise
21 the geotechnical report to provide additional information to address the comments provided by Mr.
22 Sleight during his testimony. The revised geotechnical report will be provided no later than June
23 30, 2018. Because the geotechnical report provides sufficient information to determine the
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25 ² In the May 9 Report, PDS, for the first time, requested additional information about (1) the stability analysis
26 at places other than along the secondary access road, (2) dewatering for the part of the Site west of the railroad, and
27 (3) building support in areas with liquefaction. While the geotechnical report addresses these issues, if additional
information is requested, BSRE should be given an opportunity to provide further documentation on these new
requests.

1 feasibility of the project and there is further opportunity for the geotechnical report to be revised
2 and additional studies to be conducted between the DEIS and the final environmental impact
3 statement (“FEIS”) being issued, there is reasonable doubt that a substantial conflict exists with
4 respect to SCC 30.62B.320 and .340.

5 *iii. Compliance with Buffer Requirements*

6 PDS, for the first time in its May 9 Report, stated BSRE must use the “Ordinary High
7 Water Mark (OHWM) for determining the landward extend [sic] of Shoreline jurisdiction.”³ As
8 shown in the testimony of Gray Rand on May 23, 2018, this was a new comment made by the
9 County which was not included in the prior comments. The only comments made by the County
10 in the 10/6/17 Letter related to the OHWM were:

11 Urban Center Comment (s): “Sheets A-050 and 051 indicate location of an
12 Ordinary High Water Line along the shoreline. Sheets C-201 – 203 indicate
13 location of a Line Mean Higher High Water along the shoreline. Do these terms
14 represent the same line?” (Exhibit G-13, p. 18)

15 Subcondition (8)(c) Ordinary High-Water Mark (OHWM): PDS notes that the
16 drawings for the Urban Center Submittal from March 4, 2011, make
17 interchangeable use of the terms OHWM and Mean Higher High Water (MHHW).
18 Some pages show OHWM and others show MHHW. This latter term, appears to
19 be intended to refer to Mean High Higher Tide (MHHT), which is synonymous
20 with OHWM at salt water locations per RCW 90.58.030(2)(c). For clarity, when
21 there are revisions to the application for other reasons, *please update the pages that*
22 *refer to MHHW so that they refer to either MHHT or OHWM.* (Exhibit G-13, p.
23 109 (emphasis added))

24 BSRE addressed both comments in its April 27, 2018 submittal.

25 Because of PDS’s recent notification to BSRE that the shoreline buffer must be determined
26 based on the OHWM rather than MHHW, BSRE has not yet had time to adjust its plans. As noted
27 by Gray Rand in his testimony on May 23, 2018, BSRE can and will make this change based on
the extent to which the OHWM is determinable. The OHWM is difficult to discern. BSRE must
obtain confirmation from the relevant agencies prior to making any required site changes based on

³ See Exhibit N-2, p. 19.

1 the OHWM. Specifically, Mr. Rand will arrange a meeting with Ecology and PDS on site to vet
2 the OHWM line location and characteristics, have the line surveyed, confirm the OHWM line is
3 shown correctly on the site plan and provide the new appropriate setback lines. Subsequently,
4 Perkins + Will will revise the site plan accordingly. BSRE should be provided with the opportunity
5 to address this issue raised in the May 9 Report, and BSRE can make these changes within the
6 next three months.

7 The only specific allegation related to a deficiency in the critical area report made by PDS
8 during the hearing pertained to SCC 30.62B.350. With respect to this code provision, PDS's only
9 allegation was that the Critical Area Report did not sufficiently analyze the "functions and values
10 of the critical area(s) which would be obtained by applying the standard prescriptive measures".
11 BSRE and its consultants (see Gray Rand May 23, 2018 Testimony) believe sufficient information
12 has been provided in the Critical Area Report for this stage of proceedings. While there was no
13 specific section in the CAR labeled "functions and values", the equivalent information is included
14 in the CAR. However, to facilitate PDS's review of the innovative development design ("IDD")
15 information provided, BSRE is willing and able to provide additional information regarding the
16 "functions and values" and to restructure the CAR so it is easier to navigate. BSRE will provide
17 this information within two months. On May 22, 2018, Mr. Middaugh testified he considered this
18 to be an early stage of the application. In addition, rather than stating resolutely that a conflict
19 with the code exists, he stated he did not have enough information to be able to determine whether
20 the proposed plans conflicted with SCC 30.62B.350. This creates reasonable doubt as to whether
21 such a conflict exists, and BSRE should be given the chance to provide additional information to
22 be able to resolve this issue.

23 *iv. Adequacy of Habitat Management Plan*

24 In its Issue Matrix, PDS alleges BSRE has failed to provide a sufficient habitat
25 management plan. In a habitat management plan, pursuant to SCC 30.62A.460 [2007], the director
26 may require all or a portion of the following:
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- (1) A critical area study meeting the requirements of SCC 30.62A.140;
- (2) A map drawn to scale or survey showing the location and description of the primary association area(s) of the critical species on the subject property;
- (3) Evidence of use of the site by a critical species, including the location and nature of use;
- (4) An assessment of how the proposed activities will affect the critical species and/or its habitat, and how the proposal will avoid, minimize or mitigate impacts to those critical species and their habitats pursuant to SCC 30.62A.450. The department shall waive this requirement when a proposed activity is consistent with the protection standards adopted in an administrative rule developed pursuant to SCC 30.62A.430; and
- (5) In the absence of an adopted administrative rule governing a listed species, the applicant shall provide a habitat management plan consistent with the minimum requirements of SCC 30.62A.440. In addition, the habitat management plan shall contain an assessment of best available science applicable to the species, demonstrating how the proposal will provide sufficient protection of the critical species and its habitat. Applicants are encouraged to consult with the department, and federal and state agencies with technical expertise or regulatory jurisdiction.

In his testimony on May 23, 2018, Mr. Rand testified all of these requirements were addressed in the April 27, 2018 Critical Areas Report. *See* Exhibit C-30; Gray Rand May 23, 2018 Testimony. PDS did not dispute this testimony with Mr. Rand or question him about this assertion, and, therefore, has provided no basis for its allegation that the habitat management plan is in substantial conflict with SCC 30.62A.460.⁴ This is sufficient to create reasonable doubt. However, to facilitate the County's reading of the Critical Areas Report, BSRE is willing to reformat the Critical Areas Report to have the portions relevant to the habitat management plan in one, easier to locate section. Such a revised Critical Areas Report shall be submitted within two months of the date of this brief.

v. Shoreline Stabilization

SCC 30.62A.330(2)(a)(i) [2007] provides that projects shall be sited and designed to prevent the need for shoreline or bank stabilization and structural flood hazard measures for the life of the development. As set forth in Exhibit G-24 and Bill Gerken's May 24, 2018 testimony,

⁴ PDS, on its issue chart (Exhibit O-4a, Appendix A), also identified SCC 30.62A.440 [2007] as an area of substantial conflict. However, SCC 30.62A.440 [2007] governs what the department must consider in adopting administrative rules under Chapter 30.62A SCC, and therefore is not applicable to the contents of the habitat management plan.

1 the residential developments and infrastructure are not dependent on shoreline stabilization
2 measures. Instead, the project has specifically been designed to comply with SCC
3 30.62A.330(2)(a)(i). The elevation of the esplanade has been set above the Base Flood Elevation,
4 and an adequate setback has been proposed from the shoreline to the esplanade to construct a
5 dynamically stable mixed sand-and-gravel beach. *See* Exhibit G-24. The proposed shoreline
6 modifications and rebuilt beach eliminate the need for typical shoreline protection measures. *Id.*

7 If, despite testimony by Mr. Gerken (a senior coastal engineer and expert on the subject)
8 to the contrary, PDS maintains that an IDD proposal is required, BSRE is willing to comply with
9 that request. Reasonable doubt exists as to whether there is a substantial conflict with respect to
10 SCC 30.62A.330. To show BSRE's good faith attempts to resolve all issues identified by PDS,
11 BSRE will provided such an IDD proposal.

12 **II. An Extension Should be Granted.**

13 At a November 13, 2017 meeting, PDS expressly stated the January 8, 2018 date set forth
14 in the 10/6/17 Letter was merely a target (rather than a statutory deadline) and indicated a further
15 extension would be forthcoming. *See* Douglas Luetjen May 24, 2018 Testimony. Based on that
16 meeting and a December 29, 2017 letter sent to PDS by BSRE (*see* Exhibit G-6), PDS knew BSRE
17 needed to receive and was relying on receiving an extension. However, PDS did not provide BSRE
18 with any notice the January 8 date was a "deadline" or the extension may not be granted until its
19 January 9, 2018 letter informing BSRE it may seek denial under SCC 30.61.220 because of
20 BSRE's failure to meet the January 8, 2018 "deadline." *See* Exhibit K-33. This was expressly
21 contrary to what was expressed at the November 13, 2017 meeting. Giving PDS the benefit of the
22 doubt, it appears PDS suddenly changed course, decided to no longer work with BSRE, and,
23 instead, decided to take every action possible to terminate BSRE's applications. The reason for
24 PDS's change of opinion is unknown to BSRE.

25 The fact that PDS identified 178 issues in its 10/6/17 Letter and only identified eleven
26 issues in its Issue Matrix shows BSRE has put forward a good faith effort to resolve all issues
27

1 raised by PDS. BSRE continues to rework and revise documents. This is the typical process by
2 which PDS considers an application. As Ryan Countryman testified, projects typically go through
3 seven or eight iterations, and BSRE has only submitted three revisions. Efficiency is best served
4 by allowing an applicant to revise its applications rather than denying that application and forcing
5 the applicant to start over. *See* Section V below.

6 This is further evident in SCC 30.34A.180(2)(f) [2007], which states:

7
8 The hearing examiner may deny an urban center development application without
9 prejudice pursuant to SCC 30.72.060. If denied without prejudice, the application
10 may be reactivated under the original project number without additional filing fees
11 or loss of project vesting if a revised application is submitted within six months of
the date of the hearing examiner's decision. In all other cases a new application
shall be required.

12 Ryan Countryman testified the County has had no other Urban Center applications for
13 properties which: (a) are on the water, (b) have shoreline issues, (c) are on a commuter rail line,
14 (d) have tall bluffs behind them, or (e) have slope stability issues. This is undisputedly the most
15 complicated project the County has reviewed. Because of the complexity of this project, and the
16 significant legal challenges to this project, the review and revision period of less than five years
17 (since BSRE received PDS's initial review completion letter on April 12, 2013 (Exhibit K-5) and
18 part of the time period was spent waiting for PDS to provide its comments and feedback) is not
19 unreasonable. BSRE has shown it is motivated to resolve all issues raised by PDS and should be
20 given the opportunity to do so. In the alternative, if BSRE is not granted an extension, BSRE's
21 application should be denied pursuant to SCC 30.34A.180(2)(f) so a revised application can be
22 considered under the vested code if submitted within six months of the date of the Hearing
23 Examiner's denial.

24 **III. The Hearing Examiner has Discretion to Grant an Extension.**

25 The Code specifically grants the Hearing Examiner authority and discretion to modify the
26 application expiration period and grant an extension. SCC 30.70.140(2).⁵ The Hearing

27 ⁵ The full text of SCC 30.70.140(2) is as follows:

1 Examiner's discretion under SCC 30.70.140(2) is broad and encompasses all applications set forth
2 in SCC Table 30.70.140(1), including BSRE's application. SCC 30.70.140(2) does not impose a
3 temporal restriction on the Hearing Examiner's discretion.⁶ If the Hearing Examiner exercises his
4 discretion, the modification of the application expiration period has no specific time limitation. In
5 contrast, pursuant to SCC 30.70.140(2)(a), if the Director approves the suspension of the
6 application expiration period until the FEIS is issued, such suspension is limited to 18 months.

7 Moreover, the Code generally grants the Hearing Examiner authority to "implement land
8 use regulations as provided by ordinance," SCC 2.02.020, and to take actions authorized or
9 necessary to carry out the implementation of these regulations. SCC 2.02.100(11); *Chaussee v.*
10 *Snohomish Cnty. Council*, 38 Wn. App. 630, 637, 689 P.2d 1084 (1984) ("SCC 2.02.020 gives the
11 hearing examiner authority to 'interpret, review and implement land-use regulations.'"). The
12 Hearing Examiner's authority "may be exercised on all matters for which jurisdiction is assigned
13 to the examiner either by county ordinance or by other legal action of the county or its elected
14 officials." SCC 2.02.100. The Code is clear—the Hearing Examiner has authority to make
15 decisions pursuant to SCC 30.70.140(2). The Hearing Examiner is in the best position to interpret
16 and apply his authorized discretion pursuant to the Code. *See Durland v. San Juan Cnty.*, 174 Wn.
17 App. 1, 12, 298 P.3d 757 (2012) ("An appellate court must give substantial deference to both the
18 legal and factual determinations of a hearing examiner as the local authority with expertise in land
19 use regulations." (internal quotations omitted)). PDS agreed that since the open record hearing
20 has occurred, the hearing examiner now has the authority and discretion to extend the expiration
21 date of BSRE's applications pursuant to SCC 30.70.140(2). *See Order Dismissing Appeal* (Mar.
22 23, 2018), at 2:28-30, n.2.

23
24 SCC Table 30.70.140(1) establishes the expiration period for applications, approvals, and permits, except that:

- 25 (a) When an EIS is required, the expiration period of an application will be suspended until the
FEIS is issued. The suspension of the expiration period for an application shall not exceed 18
months unless approved by the director; and
26 (b) When otherwise modified by the hearing examiner.

27 ⁶ The Hearing Examiner's discretion to grant an extension is also not limited in scope to specific permit types
by either SCC 30.70.140(2) or by any other Code provision (*e.g.*, Type I under Chapter 30.71 SCC or Type II under
Chapter 30.72 SCC).

1 **IV. No Substantial Conflict Exists if a Variance is Pending.**

2 The Code specifically authorizes applicants to apply for variances. *See* Chapter 30.43B
3 SSC. “A variance is the mechanism by which an adjustment is made to specific regulations being
4 applied to a particular piece of property.” SCC 30.43B.010. Where the variance is submitted with
5 a Type 2 permit application, the variance “shall be processed concurrently before the Hearing
6 Examiner as a Type 2 decision.” SCC 30.43B.020(2).

7 Under the explicit guidance of Chapter 30.43B SSC, any Type 2 permit project which
8 requires a variance must have the permit application and the variance request submitted
9 concurrently to the hearing examiner for approval. Under SCC 30.43B.020(2), it would be
10 impossible for a Type 2 permit for which a variance is necessary to be submitted to the hearing
11 examiner with the variance already approved. Therefore, logically, a project which depends on a
12 variance cannot be considered to be in “substantial conflict” with the code pursuant to SCC
13 30.61.220 simply because the variance has not yet been approved. If such a project was considered
14 to be in “substantial conflict,” there would be no situation where a Type 2 permit and a variance
15 should be submitted to the hearing examiner for review. Instead, any Type 2 permit application
16 which is dependent on a variance should automatically be denied under SCC 30.61.220. Because
17 this is not how PDS treats such applications, PDS should not be allowed to argue in this case that
18 BSRE’s project conflicts with code just because a variance has not yet been decided.

19 BSRE has submitted a variance request to adjust the building setbacks from lower density
20 zones under SCC 30.34A.040(2). As discussed above, this variance is not necessary. However,
21 even if it was necessary, there is reasonable doubt as to whether BSRE’s proposal is in substantial
22 conflict with SCC 30.34A.040(2) where the variance has not yet been decided. Similarly, as
23 discussed in Section I.E above, there is reasonable doubt as to whether BSRE’s proposal is in
24 substantial conflict where deviation requests are pending.

25 **V. The Code Contemplates Supplementation of Otherwise Complete Applications.**

26 Correspondence from PDS regarding its attempt to cause the termination of BSRE’s
27 application is reflective of numerous code provisions which contemplate the ongoing ability of the

1 Applicant to supplement its application. In its letter of January 24, 2018 (Exhibit K-40), PDS
2 invited BSRE to continue to supplement its application so all relevant information would be before
3 the Hearing Examiner in this proceeding. BSRE has continued to update and expand its application
4 in an ongoing effort to satisfy PDS's increasing, and arguably unreasonable, demands. That PDS
5 has not objected to this supplementation confirms its view that such supplementation is
6 appropriate.

7 This approach is consistent with numerous code provisions which clearly contemplate the
8 supplementation of otherwise complete applications. For example, SCC 30.70.110(2) exempts
9 from review timelines "[a]ny period during which the county asks the applicant to correct plans,
10 perform required studies, or provide additional required information." Similarly, SCC
11 30.70.110(3)(b) addresses substantial revisions to an application which restarts the PDS review
12 time limit on project review.

13 The environmental review provisions of the County code also expressly contemplate the
14 review by PDS of less-than-complete building plans. SCC 30.61.065(2) provides that "[t]he lead
15 department may conduct the environmental review if the proposal's impacts upon the environment
16 can be readily identified *without the submittal of detailed plans*." (Emphasis added.) This language
17 clearly contemplates ongoing addition of project details as review ensues. Similarly, SCC
18 30.61.112(3) contemplates the possibility of new information which may require further
19 environmental review if such impacts were not previously considered.

20 **VI. If an Extension is Granted, It Should be For 18 or 30 Months.**

21 If an extension is granted, BSRE respectfully requests that the extension be granted for a
22 total of 18 or 30 months. PDS indicated it would prefer a structured extension which includes
23 interim deadlines. BSRE therefore proposes the extension be structured as follows:

- 24 1. BSRE will have 90 days from the date of the order to address issues raised by PDS
25 in the May 9 Report and at the hearing.
- 26 2. PDS will then have 90 days from Step 1 to provide any additional review comments
and authorize completion of the draft DEIS.
- 27 3. BSRE will have 180 days from Step 2 to respond to additional County comments.

4. The DEIS shall be issued within 270 days of Step 2.
5. Once the DEIS is published, there will be a 45-day public comment period.
6. PDS must provide EA with copies of all public comments received within 7 days of the end of Step 5.
7. EA shall respond to all comments within 180 days of Step 6.
8. PDS and BSRE shall provide comments/revisions on the preliminary FEIS within 30 days of EA's distribution of the preliminary FEIS.
9. The FEIS shall be published within 90 days of Step 8.
10. PDS shall issue its recommendation to the Hearing Examiner no later than 14 days after Step 9.
11. The open hearing shall be resumed no later than 45 days after Step 10.
12. The Hearing Examiner decision shall be issued no later than 30 days after Step 11.

Pursuant to the above schedule, an extension of 30 months should be granted and this matter should be remanded for the County to resume processing BSRE's applications diligently and in good faith. In addition, the time period should be further extended for any period of delay which is caused by the County or the EIS consultants.

In the alternative, given the difficulty of estimating the length of time the County and EIS consultants will take in the SEPA review process, BSRE requests it be given 18 months for the preparation of any and all materials necessary for the EIS and preparation for the hearing. PDS indicated on May 24, 2018 that it anticipates spending approximately one year reviewing and responding to BSRE's next submittal. Other than perhaps reflecting PDS's efforts to usurp most of any available extended timeframe, this testimony underscores the need to tie BSRE's timeframe to BSRE's efforts alone. BSRE should not be penalized, nor should its application be jeopardized, by the County consuming most of any extended time in its own protracted review. Thus, the efforts of PDS and of the EIS consultants should be excluded from the 18-month extension.

VII. CONCLUSION

For all of the reasons stated above, BSRE requests an extension be granted, this hearing be continued until the SEPA process has been completed and all parties have had sufficient time to analyze the Project after the FEIS has been completed, and the County be ordered to proceed with the SEPA process diligently and in good faith.

1 DATED this 1st day of June, 2018.

2
3 /s/ Jacques E. St. Romain

4 Gary D. Huff, WSBA #6185
5 Douglas A. Luetjen, WSBA #15334
6 J. Dino Vasquez, WSBA #25533
7 Jacques E. St. Romain, WSBA #44167
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14 *Attorneys for Appellant*

Appendix 1



Master Permit Application for Land Use Permits and Approvals

Snohomish County
Planning and Development Services

I. Property Location

Primary property address, general location, and all associated property tax account numbers (attach separate pages if necessary):

20555 Richmond Beach Drive NW

27033 Richmond Beach Drive NW

Property Tax Acct. #s: 27033500302700; 27033500301200; 27033500302800; 27033500304000; 27033500301100; 27033500303900; 27033500303900; 270533500303000; 27033500304300; 27033500303800

II. General Project Information

Permits and/or approvals requested from Snohomish County (check all that apply):

- | | | |
|---|--|---|
| <input type="checkbox"/> Administrative Conditional Use | <input type="checkbox"/> Urban Center Development Plan | <input type="checkbox"/> Subdivision ⁹ |
| <input type="checkbox"/> Conditional Use | <input type="checkbox"/> Development Agreement | <input type="checkbox"/> Preliminary |
| <input type="checkbox"/> Variance ¹ | <input type="checkbox"/> Minor Revision ⁷ | <input type="checkbox"/> Final |
| <input type="checkbox"/> Rezone ² | <input type="checkbox"/> Major Revision ⁸ | <input type="checkbox"/> Alteration ¹⁰ |
| <input type="checkbox"/> Binding Site Plan | <input type="checkbox"/> Landscape Modification | <input type="checkbox"/> Short Subdivision ⁹ |
| <input type="checkbox"/> Administrative Site Plan ³ | <input type="checkbox"/> Shoreline | <input type="checkbox"/> Preliminary |
| <input type="checkbox"/> Official Site Plan ⁴ | <input type="checkbox"/> Substantial Development | <input type="checkbox"/> Final |
| <input type="checkbox"/> Preliminary Plan Approval ⁵ | <input checked="" type="checkbox"/> Conditional Use | <input type="checkbox"/> Alteration ¹⁰ |
| <input type="checkbox"/> Final Plan Approval ⁶ | <input type="checkbox"/> Variance | <input type="checkbox"/> Special Use ¹¹ |

Footnotes: (1) Title 30 SCC variances, except under the Shoreline Management Program (Chapter 30.44 SCC); (2) Owner(s) must sign application; (3) Urban Residential Development Standards (Chapter 30.23A SCC), Single Family Detached Units (Chapter 30.41F SCC), and Cottage Housing (Chapter 30.41G SCC); (4) Planned Residential Development (Chapter 30.42B SCC), Mobile Home Parks (Chapter 30.42E SCC), development in existing FS and GC zones, and FS, RFS, and GC rezones; (5) BP, PCB, and NB rezones, IP zone rezones for five acres or more, and development of five acres or more in existing PCB, BP, and IP zones; (6) Development in existing PCB, BP, and IP zones; (7) Type 1 and 2 residential and nonresidential applications only; (8) Type 1 and 2 residential development applications only; (9) Inclusive of Rural Cluster Subdivision or Short Subdivisions (Chapter 30.41C SCC); A majority of owners must sign application; and (11) Community Facilities for Juveniles.

Project name:

Point Wells Urban Center

Explain your request and all proposed uses included in this development proposal:

To establish a passenger only water taxi between the existing dock at Point Wells and downtown Edmonds to allow connection between the project and the Edmonds Sounder Station and ferry terminal.

III. Applicant Information

	Applicant	Contact person (if different)
Name:	BSRE Point Wells, LP	Douglas A. Leutjen
Mailing Address:	c/o Karr Tuttle Campbell 701 5th Ave	Karr Tuttle Campbell
City, State, Zipcode:	Suite 3300, Seattle WA 98104	701 5th Ave, Suite 3300
Phone:	206 224 8061	Seattle WA 98104
Email:	dluetjen@karrtuttle.com	

Applicant's interest to property (check one):

☒ Owner ☐ Consultant ☐ Contract Purchaser ☐ Lessee ☐ Other (specify): _____

All persons and/or entities having an ownership interest in the property:

Name:	BSRE Point Wells, LP	Phone:	206 224 8061
Address:	same as above	Email:	dluetjen@karrtuttle.com
Name:	_____	Phone:	_____
Address:	_____	Email:	_____
Name:	_____	Phone:	_____
Address:	_____	Email:	_____

IV. Site Information

General site information:

Site Acreage: 61.19 Site Square Footage: _____

Present Zoning: PCB Vested to UC Present Comprehensive Plan Designation: UV

Source of water supply (check one):

☐ Private Well ☐ Group Well ☒ Public Water (specify purveyor): Olympic Water & Sewer

Method of sewage disposal (check one):

☐ On Site Septic ☐ Off Site Septic ☒ Public Sewer (specify purveyor): Ronald Wastewater

V. Civil Construction Information

Proposed land disturbing activities:

☐ Clearing ☐ Grading ☒ Other (specify): For this purpose, none

Is the proposal "new development" under SCC 30.91N.044? ☐ Yes ☒ No

Is the proposal "redevelopment" (35% existing hard surfaces) under SCC 30.91R.070? ☐ Yes ☒ No

Proposed hard surfaces (square feet): N/A for this proposal

New: 0 Replaced: 0 New plus replaced: 0

Proposed clearing (square feet): 0

Conversion of native vegetation to lawn and/or landscaped areas (square feet): 0

Conversion of native vegetation to pasture (square feet): 0

Proposed grading quantities (cubic yards):

Cut: 0 Fill: 0

VI. Project Specific Information

For rezones:

Zoning requested: _____

Has anyone applied for a rezone on this property within the last year? ☐ Yes ☐ No

If yes, when? _____

For subdivisions and short subdivisions:

Plat name: _____ Proposed number of lots: _____

Proposed number of tracts: _____ Public road dedication? ☐ Yes ☐ No

For variances:

Code requirements from which relief is sought: _____

For Shoreline Substantial Development or Conditional Use Permits:

Total cost or fair market value, whichever is higher, of project including all construction finishing work plus permanent equipment to be installed for which the permit will be issued: \$ 25,000.00

Construction dates for which permit is requested (month and year): Begin: ____/____/____ End: ____/____/____

Does this project require a Shoreline/Floodplain location? ☐ Yes ☐ No


If yes, please explain why: _____

Waterbody: _____ Shoreline Environment Designation: Puget Sound Conservancy

VII. Authorization

For all applications^{1,2}:

I am the property owner or am authorized by the property owner to sign and submit this application. I grant permission for County staff and/or its agents to enter onto the subject property for the sole purpose of making any inspections of the property which are necessary to process this application in accordance with Chapter 30.81 SCC. I certify under penalty of perjury of the laws of the State of Washington that the information on this application and all information submitted herewith is true, complete, and correct.

Signature:  Date: 5/31/2018

Printed name: DOUGLAS A. LUETTEN Relationship to project: APPLICANT AUTHORIZED SIGNATORY

Signature: _____ Date: _____

Printed name: _____ Relationship to project: _____

Footnotes: (1) For rezones, the property owner(s) must sign. If more than one owner, add authorization pages. (2) For subdivision and short subdivision plat alterations, a majority of all owners must sign the application.

Appendix 2

Supplement to Urban Center Development Application

11-101457 LU (Land Use permit for site plan)
11-101461 SM (Shoreline Management permit)
11-101464 RC (Retaining Wall – Commercial)
11-101008 LDA (Land Disturbing Activity – grading)
11-101007 SP (Short Plat)
11-101457 VAR (Parking Variance)

May 30, 2018

BSRE Point Wells, LP, (“**BSRE**”) hereby supplements its applications for the proposed Point Wells Urban Center (the “**Project**”).

1) Vehicle Trip Limit and Traffic Mitigation.

In a Memorandum of Understanding (“**MOU**”) dated April 1, 2013 between BSRE and the City of Shoreline, attached hereto as Exhibit A, the parties thereto agreed to jointly sponsor and conduct a Richmond Beach Traffic Corridor Study (the “**Corridor Study**”). The study, now substantially complete but awaiting Shoreline City Council review and approval, was intended (i) to establish a mechanism for the citizens of Shoreline to participate in a public process regarding the analysis of transportation issues and acceptable mitigation alternatives associated with the proposed Point Wells development; and (ii) establish the terms and methodology by which the transportation impacts of the development would be analyzed, mitigated and eventually incorporated into Snohomish County’s environmental analysis for BSRE’s development applications.

At Section 1 of the MOU, the parties agreed “for the purposes of [the Corridor Study], that the net new trips (along Richmond Beach Drive NW) generated from the proposed development at Point Wells shall be assumed not to exceed 11,587 average daily trips (“ADT”) at the Project access point into Shoreline.” While BSRE and Shoreline have not finalized all aspects of the Corridor Study and the actions to be taken in support thereof, the study nonetheless contains valuable information with which BSRE can effectively mitigate the traffic impacts likely to occur because of the development of Point Wells.

An outcome of the Corridor Study process was the collaborative development and documentation of traffic mitigation measures to be implemented within the City of Shoreline. These traffic mitigation measures are outlined in detail in Section 4 of the Expanded Traffic Impact Analysis report for Point Wells that was submitted to the County on September 1, 2016.

Contingent on the City of Shoreline complying with its commitments outlined in the MOU, BSRE hereby supplements its Application by incorporating therein a limit to the number of net

new daily vehicle trips generated from its proposed development at Point Wells (“**Project Trips**”) to not more than 11,587 (the “**Trip Cap**”) at the Project access point into Shoreline.

2) Monitoring of Vehicle Trips and Reporting of Compliance.

A. Assuming the approval of the Urban Center Application as submitted, BSRE agrees that upon the issuance of Certificates of Occupancy for three hundred fifty (350) dwelling units (representing approximately one half of the proposed number of dwelling units in Phase 1 of the Project), BSRE shall at its cost install and maintain a mechanical vehicle trip counting device (the “Trip Counting Device”) at the main Project entrance. Nothing herein shall preclude BSRE, upon not less than thirty (30) days’ advance written notice to the City of Shoreline (the “**City**”) and Snohomish County (the “**County**”), from utilizing alternative and equally accurate trip counting devices or means.

B. Assuming the approval of the Urban Center Application as submitted, BSRE agrees that upon the issuance of Certificates of Occupancy for seven hundred and twenty (720) dwelling units (representing the proposed number of dwelling units in Phase 1 of the Project), BSRE shall provide a trip generation report (a “**Report**”) to the City and County, at intervals of not less than every six (6) months (a “**Reporting Period**”), of the average number of new net daily Project Trips as measured during said Reporting Period. Each Report shall also set forth the number of Project Trips measured each the day during the AM and PM peak hours for that Reporting Period.

C. Assuming the approval of the Urban Center Application as submitted, BSRE agrees that the average of the previous twelve (12) monthly counts of Project Trips shall be the number of Project Trips used to determine compliance with the Trip Cap.

3) Comparison to Anticipated Trip Counts By Project Phase.

Assuming the approval of the Urban Center Application as submitted, BSRE agrees to the following:

A. The anticipated number of Project Trips by phase shall be as set forth in Exhibit B hereto.

B. Commencing with the proposed development of any portion of Phase 3, if at any time the number of projected Project Trips, when added to the average Trip Count in the prior two Reports, exceeds the trip projection applicable to that development phase as set forth in Exhibit B, then BSRE shall take such action as is necessary to cause the number of Project Trips for the next development phase, when added to the average Trip Count from the previous two Reporting Periods, to come into compliance with the trip projection set forth in Exhibit B.

C. The manner by which BSRE shall cause the Trip Count for the next proposed development phase to come into compliance with the limit set forth in Exhibit B for that phase shall be within BSRE’s sole discretion. BSRE may, for example and without limitation, combine individual residential units so as to create fewer larger units. By way of further illustration, BSRE

might, for example and without limitation, increase the number of senior units (each of which will generate fewer Project Trips) so as to cause the anticipated number of Project Trips to comply with the applicable limit.

D. At such time as the Project Trips match or exceed 80% of the Trip Cap, then BSRE shall so notify the County and the City. Thereafter, BSRE may submit development applications only for such number of units and/or commercial or retail space for which the anticipated Project Trips, when added to the Project Trips associated with the existing amount of development, shall not exceed the Trip Cap. BSRE shall not submit any further development applications (where the Project Trips associated therewith will cause the Trip Cap to be exceeded) until such time as the number of actual Project Trips and the projected Project Trips associated with such additional development are brought into compliance with the Trip Cap. Nothing herein shall preclude BSRE from taking such actions as may be necessary to cause such a reduction in Project Trips in an effort to bring about compliance with the Trip Cap.

E. BSRE shall ensure through covenants recorded against the project site or through other means approved by the County, that the obligation to conduct such monitoring and provide such Trip Reports shall be conducted as set forth herein during the full term of the Monitoring Requirement (as defined herein).

F. Nothing herein shall preclude BSRE from altering the order of construction of the Project Phases or from establishing sub-phases. The Project Trips per phase shall remain unchanged regardless of the order in which the phases are constructed.

G. BSRE's compliance with the provisions herein regarding compliance with the Trip Cap shall be enforceable by the City and/or the County in Snohomish County Superior Court.

H. The City and the County shall have the right, upon forty-eight (48) hours' advance notice (not including weekends of federal or state holidays), to inspect or otherwise monitor the Trip Counting Device so as to ensure that the trip numbers produced thereby are accurate and reliable.

I. BSRE shall continue to monitor the number of Project Trips until such time as the Project shall have received Certificates of Occupancy for the number of dwelling units authorized in the Project permit approvals (the period of time where monitoring is required shall be referred to herein as the "**Monitoring Requirement**").

J. Contemporaneous with the issuance of final project approvals, BSRE shall deliver to the County an agreement, in recordable form, under which BSRE agrees that it may not bring suit against the County for refusing to approve permit requests when the projected number of trips exceeds the Trip Count as determined and/or confirmed by BSRE's traffic consultant.

4) Senior Housing.

Of the dwelling units proposed in the Urban Center application, not less than 1,093 units are planned to be designated as Retirement Apartments (as defined in SCC 30.91R.180) or Senior Housing (SCC 30.91D.190) (hereinafter “Senior Units”). Senior Units are currently planned to be constructed at the locations depicted in the revised site plan submitted herewith. Those units are allocated by phase as shown in Exhibit C.

5) Supplemental Transit Service.

SCC 30.34A.085, requires that access to public transportation must be provided to the businesses and residents of the future Project. SCC 30.34A.085(3) provides that at a minimum, a development “shall provide a mechanism such as van pools or other similar means of transporting people on a regular schedule in high occupancy vehicles to operational stops or stations for high occupancy transit.” BSRE recognizes that currently available public transit cannot by itself provide the level of service necessary to meet the above requirement. While it will attempt to work with the various transit agencies to bring about an increase in available public transit service, BSRE commits to provide at its cost, to contract with third parties, for such additional transit service as is necessary to achieve compliance with the above standard. The type and extent of such supplemental transit service currently contemplated is more fully identified in Exhibit D hereto.

6) Commitment to Fund Sound Transit Commuter Rail Station.

Sound Transit has expressed an interest in providing commuter rail service at Point Wells once a sufficient on-site population is achieved. It is expected that Sound Transit’s interest in providing such commuter rail service will be contingent upon BSRE’s willingness to fully fund the construction of the on-site commuter rail station. If required by Sound Transit, BSRE agrees to provide such funding.

7) Elimination of Beach Groins.

A number of early plan drawings depict the construction of a number of “beach groins” along the shoreline. Those groins are no longer part of the development plan and are hereby eliminated from the Point Wells Urban Center application.

EXHIBIT A

Shoreline/BSRE Memorandum of Understanding

EXHIBIT B

Projected Net New Traffic Trips By Phase

Projected Net New Traffic Trips By Phase

Project Phase	Residential Units	Commercial SF	Retail SF	Project Trips (Daily)	Project Trips (AM Peak)	Project Trips (PM Peak)
I— South Village	720	2,927	29,914	3,075	347	329
II— Urban Center	272	31,338	26,490	2,299	174	246
IIIA— Central Village	602	0	15,643	3,056	316	327
IIIB— Central Village	602	0	12,071			
IVA— North Village	445	0	0	1,598	134	171
IVB— North Village	444	0	0			
TOTAL	3,085	34,265	84,118	10,028	971	1,073

EXHIBIT C

SENIOR UNITS BY PHASE

SENIOR UNITS BY PHASE

Phase 1	288
Phase 2	136
Phase 3	313
<u>Phase 4</u>	<u>356</u>
Total	1,093

EXHIBIT D

Supplemental Transit Service

Supplemental Transit Service

BSRE shall ensure the availability of supplemental transit service serving the Project as follows:

Section 1. Alternative Means of Providing Supplemental Transit Service.

Supplemental service shall, at BSRE's election, be provided under contract with a public transit provider (for example, contracted service provided by Metro Transit), under contract with a private transit service, or by a transit service owned and operated by BSRE or its concessionaire.

Section 2. Transit Route.

Transit service shall be provided between the Project site and the Metro Park & Ride stop at North 192nd and Aurora Avenue North. At such time as the Sound Transit light rail station at 185th and Aurora Avenue becomes operational, the route shall be extended to such light rail station.

Section 3. Frequency of Service.

Supplemental transit service shall commence no later than the date upon which certificates of occupancy have been issued for seven hundred and twenty (720) units within the Project (which corresponds with the proposed number of units in Phase 1 of the Project). The frequency of service shall be determined in part by the demand therefor from Point Wells' residents. In addition, it is anticipated that service shall be provided on weekday mornings between 6:00 and 9:00 (the "**AM Peak Hours**") and on weekday evenings between 4:00 and 7:00 (the "**PM Peak Hours**"). BSRE will ensure the availability of sufficient seating capacity that the number of Project Trips shall remain within the limits established in the MOU included as Exhibit A hereto. At full buildout, it is anticipated that during the AM and PM Peak Hours that four (4) transit vehicles with a seating capacity of not less than forty (40) seats each shall depart Point Wells at least every fifteen (15) minutes.

Section 4. Priority Use by Residents of Point Wells and Service for the General Public.

The supplemental transit service described herein shall be primarily for the use and convenience of the residents of Point Wells. To the extent that seating remains available, and to the extent permitted by King County Metro, Point Wells' buses may stop along Richmond Beach Road to provide service to the Richmond Beach community. Subject to the approval of King County Metro, nothing herein shall prohibit BSRE or other operator of the supplemental transit service from collecting reasonable fares, either from such Point Wells residents or from members of the Richmond Beach community along such route.

Section 5. Termination of Service.

Supplemental transit service may be terminated at such time as a Sound Transit Commuter Rail station at the Project becomes operational or when the County and the City deem such service to no longer be necessary.

Section 6. Successors and Assigns.

BSRE shall ensure, either by way of binding agreements with other parties or through a Point Wells master homeowners association, that the obligation to provide such supplemental transit service shall be perpetual unless and until service may be terminated as provided in Section 5 hereto.

SNOHOMISH COUNTY HEARING EXAMINER

BSRE POINT WELLS, LP ,

Appellant

v.

SNOHOMISH COUNTY PLANNING AND
DEVELOPMENT SERVICES,

Respondent.

NO. 11-101457 LU

CERTIFICATE OF SERVICE

I, Heather L. Hattrup, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 701 Fifth Ave., Suite 3300, Seattle, WA 98101. On June 1, 2018, I caused a true and correct copy of Closing Brief of BSRE Point Wells, LP and BSRE Point Wells, LP's Proposed Findings of Fact and Conclusions of Law to be filed with the Snohomish County Hearing Examiner. I caused the same to be served on the parties listed below in the manner indicated.

Matt Otten
Snohomish County Prosecuting Attorney
Robert Drewel Building
3000 Rockefeller Avenue, 8th Floor, M/S 504
Everett, WA 98201

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Via U.S. Mail
Via Hand Delivery
Via Electronic Mail
Via Overnight Mail
CM/ECF via court's website

Snohomish County Hearing Examiner
3000 Rockefeller Avenue, M/S 405
Everett, WA 98201

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CM/ECF via court's website

/s/ Heather L. Hattrup

Heather L. Hattrup
Assistant to J. Dino Vasquez and
Jacque E. St. Romain